

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>REGINA GUIDEN</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 208,848
<b>CHRIST VILLA NURSING CENTER</b>	)	
Respondent	)	
AND	)	
	)	
<b>LEGION INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appeal from an April 18, 1997, Award entered by Administrative Law Judge Nelsonna Potts Barnes.

**APPEARANCES**

Claimant appeared by her attorney, Dennis L. Phelps of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, John S. Seeber of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The Administrative Law Judge granted claimant a permanent partial disability award based upon a percentage of functional impairment. Respondent and its insurance carrier seek review of that finding. Specifically, respondent contends that claimant has failed to prove any permanent impairment as a result of the work-related injury.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire record and having considered the briefs of the parties, the Appeals Board finds that the Award entered by the Administrative Law Judge should be modified.

The Administrative Law Judge awarded claimant an 8.5 percent permanent partial impairment of the right shoulder. This figure was arrived at by averaging the 2 percent permanent impairment of function rating given by board-certified orthopedic surgeon Anthony G. A. Pollock, M.D., and the 15 percent permanent impairment of function rating given by board-certified orthopedic surgeon Edward J. Prostic, M.D. Both ratings were to the area of the shoulder which is a disability covered by the schedule contained in K.S.A. 44-510d(a).

As stated above, respondent disagrees with the findings and conclusions of the Administrative Law Judge concerning the claimant's impairment of function. Respondent contends that claimant has no permanent disability under K.S.A. 44-510d(a) because of the following requirement in subsection (23) of that statute:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the third edition, revised, of the American Medical Association Guidelines for the Evaluation of Physical Impairment [*sic*], if the impairment is contained therein.

Respondent argues that the record does not contain a credible opinion based upon the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised) (hereinafter *AMA Guides*). Dr. Pollock gave "a 2% impairment to her shoulder as a result of persistent shoulder pain without any definite pathological lesion" in a letter dated July 19, 1996. However, at his deposition, Dr. Pollock explained that such rating was given utilizing a "generous fudge factor" and giving claimant "the benefit of the doubt that she was having some pain." Moreover, the 2 percent rating was not given pursuant to the *AMA Guides*. Dr. Pollock testified that if he were to base his impairment of function rating upon the *AMA Guides*, then his opinion would change to find a 0 percent impairment.

Dr. Pollock treated claimant during the period of March 5, 1996, through June 26, 1996, for the injury she suffered October 13, 1995. He released claimant to return to work effective June 27, 1996. At his final examination of claimant, Dr. Pollock found the shoulder to have a full range of motion, no weakness, no instability, and no crepitus. Dr. Pollock testified that if another orthopedic surgeon examined claimant on September 30, 1996, and found crepitus in claimant's right shoulder, that most likely the crepitus was not caused by claimant's October 13, 1995, work-related injury.

Dr. Prostic examined claimant on September 30, 1996. He opined a 15 percent impairment rating based upon mild weakness in internal and external rotation, joint instability, and mild to moderate crepitus. Respondent argues that Dr. Prostic's rating should be

disregarded because it is not based upon the *AMA Guides* as required by statute and because the finding of crepitus is either not credible based upon the absence of crepitus at any time prior to claimant's release to return to work by Dr. Pollock or that, in the alternative, any crepitus claimant may have had at the time of her examination by Dr. Prostic was the result of some subsequent injury.

For the reasons discussed below, the Appeals Board agrees that portions of Dr. Prostic's rating cannot be utilized to support an award of permanent partial disability compensation.

Dr. Prostic opined that his finding of mild weakness in internal and external rotation could be rated as 1 to 25 percent impairment under Table 11 on page 42 of the Third Edition, Revised, of the *AMA Guides*. However, that table provides for the determination of impairment of the upper extremity due to loss of power and motor deficits resulting from peripheral nervous system disorders. Dr. Prostic admitted that he did not find any peripheral nervous system abnormality. Therefore, any weakness he found in claimant's internal and external rotation of the right shoulder could not have resulted from a peripheral nervous system disorder and Table 11 cannot be utilized to substantiate Dr. Prostic's rating in this regard.

Dr. Prostic then advised that because he did not find the *AMA Guides* to have a sufficient section for such weakness, then he could rely on page 41 of the *AMA Guides* to rate claimant's pain. However, that section likewise requires the pain to be associated with peripheral spinal nerve disorders so, again, claimant had no rateable impairment for his finding of weakness. Similarly, his reference to page 52 of the *AMA Guides* under the heading "Other Musculoskeletal System Defects" allows for an additional impairment to be given at the physician's discretion "if the examiner feels that the measured anatomical impairment does not appropriately rate the severity of the patient's condition." However, that provision requires that the musculoskeletal defect be demonstrated by some imaging technic such as MRI or surgical visualization. That was not done in this case. The Appeals Board finds that Dr. Prostic did not have sufficient clinical findings to justify his assessment of impairment in this instance.

Dr. Pollock agreed that in the absence of a peripheral spinal nerve abnormality or disorder, he would not expect a rating to be assigned for a finding of pain or weakness.

Also, Dr. Prostic's rating for joint instability was based upon his "suspicion" of such a diagnosis. The suspicion of a diagnosis cannot form the basis of a reliable expert opinion of permanent functional impairment.

Finally, Dr. Prostic testified he found crepitus in claimant's shoulder. Because the *AMA Guides* allows for a 10 percent rating for mild crepitus and a 20 percent rating for moderate crepitus, Dr. Prostic could justify his entire 15 percent impairment rating solely upon the finding of crepitus. In attributing this finding to the claimant's October 13, 1995, injury, Dr. Prostic assumed that claimant had crepitus before she returned to work on June

27, 1996, and, even if she did not, in the absence of a reported injury, he still believed it was a natural progression of her underlying disorder. However, Dr. Pollock testified that claimant did not have crepitus when he treated her and, furthermore, that if claimant had crepitus on September 30, 1996, it was most probably not caused by the October 13, 1995, injury. The Appeals Board finds Dr. Pollock's opinion on causation of claimant's crepitus to be the more credible. Therefore, no impairment can be assigned for crepitus as a result of the work-related injury which is the subject of this case.

The Appeals Board finds that none of the impairment opinions given by Dr. Prostic can form the basis of an award of disability in this case because they are either unsupportable under the *AMA Guides* or cannot be causally connected to the work-related injury. The 0 percent functional impairment rating given by Dr. Pollock under the *AMA Guides* is adopted by the Appeals Board. Claimant is denied an award for permanent partial disability compensation. The remaining findings and conclusions by the Administrative Law Judge are adopted by the Appeals Board to the extent they are not inconsistent with the above findings and conclusions.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated April 18, 1997, should be, and is hereby, modified to deny permanent partial disability benefits but is otherwise affirmed and the remaining orders contained in said Award are hereby adopted by the Appeals Board as its own.

#### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1997.

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BOARD MEMBER

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BOARD MEMBER

#### **DISSENT**

The undersigned Board Members disagree with the majority opinion, finding claimant is not entitled to permanent disability benefits, and would affirm the decision by the Administrative Law Judge awarding claimant benefits for an 8.5 percent loss of use of the shoulder.

Two physicians testified, Dr. Pollock and Dr. Prostic. Both assigned an impairment rating. Dr. Pollock assigned a rating of 2 percent but agreed at his deposition that his rating would be 0 percent under the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). The majority relies exclusively on Dr. Pollock's 0 percent opinion and goes to great effort to explain why Dr. Prostic's rating of 15 percent should be completely disregarded. The undersigned would find Dr. Prostic's opinion entitled to some weight. He found impairment, manifest by crepitus, pain, and weakness, which he attributes to the injury. We would, as above indicated, affirm the award based on 8.5 percent loss of use of the shoulder.

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS  
John S. Seeber, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director